LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 21 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1113~~ 213

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, ET AL.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting the writ	7
Misapplication of the *Colloplate* case	8
Exclusive dealerships are not "virtually *per se* lawful"	12
The *Schwing* case is not in point	20
Conclusion	22
Appendix A: Opinion of the Court of Appeals	23
Appendix B: Judgment of the Court of Appeals	30
Appendix C: Order of Court of Appeals denying petition for rehearing *in banc*	31
Appendix D: Statutes involved	32
Appendix E: Supplementary statement of facts	33

CITATIONS

Cases:

Albert Peck-Barth Co. v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (C.A. 1), *cert. denied*, 286 U.S. 552	17
Alexander's Department Stores v. *Ohrbach's Inc.*, 40 N.Y.S. 2d 631, *rev.* 42 N.Y.S. 2d 703	18
Allen Bradley Co. v. *I.B.E.W. Local No. 3*, 325 U.S. 797	14
American Federation of Tobacco Growers, Inc. v. *Neal*, 183 F.2d 869 (C.A. 4)	17
Arthur v. *Kraft-Phenix Cheese Corp.*, 26 F.Supp. 824 (D.C. Md.)	20
Automatic Canteen Co. v. *F.T.C.*, 334 U.S. 61	16
Bascomb Launder Corp. v. *Telecoin Corp.*, 204 F.2d 331 (C.A. 2), *cert. denied*, 345 U.S. 994	13

PAGE

Board of Trade of the City of Chicago v. *U.S.*, 246 U.S. 231, 238 16
Brosious v. *Pepsi-Cola Co.*, 59 F.Supp. 429 (M.D. Pa.), *aff'd on other grounds*, 155 F.2d 99 (C.A. 3) 22
Caldwell-Clements, Inc. v. *Conran Publishing Corp.*, 130 F.Supp. 362 (S.D.N.Y.) 18
Dr. Miles Medical Co. v. *Parks*, 220 U.S. 373 15
Dublin Distributors, Inc. v. *Edward & John Burke, Ltd.*, 109 F.Supp. 125 (S.D.N.Y.) 22
Fargo Glass & Paint Co. v. *Globe American Corp.*, 201 F.2d 534 (C.A. 7), *cert. denied*, 345 U.S. 942 13
Fashion Originator's Guild v. *F.T.C.*, 312 U.S. 457 18
Fedderson Motors, Inc. v. *Ward*, 180 F.2d 519 (C.A. 10) 22
F.T.C. v. *Beech-Nut Packing Co.*, 257 U.S. 441 15
G & P Amusement Co. v. *Regent Theatre Co.*, 107 F.Supp. 453, *aff'd. per curiam*, 216 F.2d 749 (C.A. 6) 14
Gamco, Inc. v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (C.A. 1), *cert. denied*, 344 U.S. 817 17
Hudson Sales Corp. v. *Mark Waldrip*, 211 F.2d 268 (C.A. 5), *cert. denied*, 348 U.S. 821 22
International Salt Co. v. *U.S.*, 332 U.S. 392 ..... 10, 16
Interstate Circuit, Inc. v. *U. S.*, 306 U.S. 208 10
Kansas City Star Co. v. *U. S.*, 240 F.2d 643 (C.A. 8) 12
Montague & Co. v. *Lowry*, 193 U.S. 38 18
Paramount Film Distributing Corp. v. *Village Theatre, Inc.*, 228 F.2d 721 (C.A. 10) 16
Parmelee Transportation Co. v. *Keeshin*, 144 F.Supp. 480, 485 (D.C. Ill.) 18
Riedley v. *Hudson Motor Car Co.*, 82 F.Supp. 8 (W.D. Ky.) 22
Schwing Motor Co. v. *Hudson Sales Co.*, 138 F.Supp. 899 (D.C. Md.), *aff'd. per curiam*, 239 F.2d 176 (C.A. 4) 20, 21
Standard Oil of Calif. v. *U. S.*, 337 U.S. 293, 305 16
Standard Oil Co. of New Jersey v. *U. S.*, 221 U.S. 1 14

PAGE

Union Circulation Co. v. *F.T.C.*, 241 F.2d 652 (C.A. 2) 18
U. S. v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6) 13
U. S. v. *Bausch & Lomb Optical Co.*, 45 F.Supp. 387 (S.D.N.Y.), *aff'd in part*, 321 U.S. 707 13, 15
U. S. v. *Colgate & Co.*, 250 U.S. 300 3
U. S. v. *Columbia Steel Co.*, 334 U.S. 495 18
U. S. v. *Crescent Amusement Co.*, 323 U.S. 173 10
U. S. v. *Detroit Sheet Metal & Roofing Contractors Association*, 116 F.Supp. 81 (E.D. Mich.) 18
U. S. v. *du Pont & Co.*, 351 U.S. 377 2, 6, 12, 15
U. S. v. *duPont & Co.*, 25 L.Wk. 4343 (June 3, 1957) 3, 7, 16, 21
U. S. v. *Griffith*, 334 U.S. 100 10
U. S. v. *Imperial Chemical Industries, Ltd.*, 105 F.Supp. 215, 245 (S.D.N.Y.) 18
U. S. v. *International Boxing Club*, 150 F.Supp. 397, 419 (S.D.N.Y.) 12
U. S. v. *Klearflax Linen Looms, Inc.*, 63 F.Supp. 32 (D.C. Minn.) 18
U. S. v. *New Orleans Insurance Exchange*, 148 F.Supp. 915, 920 (D.C. La.) 18
U. S. v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n 59 11
Van Camp & Sons v. *American Can Co.*, 278 U.S. 245 16
William Goldman Theatres, Inc. v. *Loew's, Inc.*, 150 F.2d 738 (C.A. 3), *cert. denied*, 334 U.S. 811 17

Statutes:

Public Law 1026, 84th Cong., 2d Sess. (Aug. 8, 1956) 19

Miscellaneous:

"Antitrust Policy and the Cellophane Case", Turner, Harvard Law Review, December 1956 11
"Automotive News", June 17, 1957, pp. 1, 82-83 18
Hearings before House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. on H.R. 6544; July 6, 1955 18

PAGE

Hearings before House Committee on the Judiciary, 84th Cong., 2d Sess. on H.R. 11360 and S. 3879; July 2, 3, 9 and 10, 1956 19
H. Rept. 2850, 84th Cong., 2d Sess., on S. 3879, July 20, 1956 20
"Manufacturer-Dealer Legislation", 57 Col.L. Rev. 219-238 (Feb. 1957) 19
"Recent Developments: Anti-Trust Exclusive-Car Dealership—Elimination of Competitive Dealer", 2 Howard L. J. 256 (June 1956) 12
Report of Attorney General's National Committee to Study the Antitrust Laws (1955) 14, 15, 22
Senate Doc. 32, 85th Cong., 1st Sess., "The Right To Buy And Its Denial To Small Business," March 1957 18
"Statutory Regulation of Manufacturer-Dealer Relations in the Automobile Industry," 70 Harvard 1239-1257 (May 1957) 19
"The Resurgence of the Exclusive Territorial Distributorship as an Antitrust Problem," 40 Minn.L.Rev. 853 (June 1956) 12

IN THE

Supreme Court of the United States

October Term, 1956

No.

THE WEBSTER MOTOR CAR COMPANY,
Petitioner

v.

PACKARD MOTOR CAR COMPANY, ET AL
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Webster Motor Car Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on April 18, 1957.

OPINIONS BELOW

The judgment of the U. S. District Court for the District of Columbia in favor of Webster for $570,000 was entered without opinion on June 21, 1955 (R. 118). The ruling of the District Court denying the motion of Packard Motor Car Company for a directed verdict at the close of Webster's evidence is unreported but appears at R. 466. The District Court's ruling denying Packard's motion for a directed verdict at the close of all the evidence is likewise unreported but appears at R. 837. The opinion of the District Court denying Packard's motions for judg-

ment n.o.v. and for a new trial is reported at 135 F. Supp. 4, and is printed at R. 136. The majority and dissenting opinions of the Court of Appeals below reversing the District Court judgment are unreported but are printed as Appendix A, *infra*, p. 23.

JURISDICTION

The Court of Appeals' judgment was entered on April 18, 1957 (App. B, *infra*, p. 30). A timely motion for rehearing *in banc* was denied by a divided court on May 16, 1957 (App. C, *infra*, p. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The jury found that Packard, an automobile manufacturer, had violated the Sherman Act by conspiring with Zell, its largest dealer in Baltimore, that Packard would terminate the franchises of its two other Baltimore dealers. The Court of Appeals, one judge dissenting, reversed the judgment for $570,000 awarded upon the jury's verdict. The questions presented are:

1. Whether an agreement or conspiracy between a manufacturer and its largest dealer, at the instigation of the latter, to eliminate the dealer's competitors, for the purpose of giving the dealer a monopoly in the sale of the manufacturer's product, is immunized as a matter of law from the prohibitions of sections 1 and 2 of the Sherman Act on the theory that the manufacturer might have unilaterally decided to grant an exclusive dealership.

2. Whether the doctrine of the *Cellophane* case, which defined the relevant market for purposes of monopolization within the meaning of section 2 of the Sherman Act, dictates the relevant market as a matter of law for agreements and conspiracies violative of section 1 of the Sherman Act and of con-

spiracies to monopolize violative of section 2 of the Sherman Act. Particularly, in the present conspiracy case under sections 1 and 2 of the Sherman Act, must the relevant market *as a matter of law* embrace competition in the sale of *all* automobiles, thereby precluding a jury from finding that the relevant market was confined to competition in the sale of Packard automobiles?

3. As the dissent below points out, the majority limits sections 1 and 2 of the Sherman Act to horizontal conspiracies between dealers, ruling out as nonactionable a vertical conspiracy between a manufacturer and a dealer to eliminate competition between dealers. Is this contrary, in principle, to this Court's decision in the *du Pont-General Motors* case (decided June 3 last) and other decisions?

4. Whether an automobile manufacturer's right to select those with whom it will deal (*U.S.* v. *Colgate & Co.*, 250 U.S. 300) is so absolute as to immunize the manufacturer's conspiracy with a preferred dealer to eliminate the dealer's competitors.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (15 U.S.C. 1, 2) and Section 4 of the Clayton Act (15 U.S.C. 15) appear in Appendix D, *infra*, p. 32.

STATEMENT

On February 13, 1953 Webster Motor Car Company brought suit under 15 U.S.C. 15 against Packard Motor Car Co. and Zell Motor Car Co. of Baltimore, Maryland, to recover treble the damages caused Webster by defendant's conspiracy in violation of sections 1 and 2 of the Sherman Act. Valid service could not be effected on Zell in the District of Columbia.

Webster's complaint alleged and the evidence warranted the jury in finding as follows:[1] For some years prior to the Spring of 1952 there were three franchised Packard dealers in the metropolitan Baltimore area (including Webster and Zell). All were acceptable to Packard and were making money. Their competition with each other was satisfactory to Packard and of great benefit to the public. In order to make more money through complete control of trade-in allowances and service charges, Zell threatened to give up his dealership unless Packard terminated the dealerships of his competitors. Packard, without seeking to dissuade Zell, or conferring with Webster or other persons as to alternatives, secretly agreed to do, and did, what Zell requested, thus destroying his competitors to the great injury of the Baltimore consuming public. Packard admitted that a Packard owner got a better trade-in allowance from a Packard dealer than from a dealer in some other make of car, for instance a Buick dealer (R. 624).

Packard at first in its answer denied any such secret agreement with Zell. However, at the trial, the agreement and conspiracy were overwhelmingly proved by Packard's own witnesses and its documents. Packard then shifted its defense to a claim that its decision to make Zell its sole Baltimore Packard dealer was a lawful business decision. The court left this issue of conspiracy or valid independent business decision to the jury (R. 940-4) and the jury found in Webster's favor.

The court also left to the jury the question of which competition was more important to the public,—the competition between the Baltimore Packard dealers as Webster's evidence showed; or, as Packard claimed, the competition between Packard and other makes of cars (R. 944-5). Here, too, the jury found for Webster.

---

[1] A detailed summary of the evidence with record references appears as Appendix E, *infra*, p. 33.

Also left to the jury was the question whether, after notice of suit, Packard's offer to renew Webster's franchise for a year was made in good faith or as part of a further secret agreement with Zell to terminate Webster at the end of the year finally and irrevocably (R. 940-1, 945). The jury found for Webster.

The following significant facts were stated by Judge Bazelon in the dissenting opinion below and not questioned in the majority opinion (App. A, *infra*, p. 27).

> "There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that Packard had found Webster to be a satisfactory dealer with a good organization; that there was an 'understanding' between Zell and Packard, and that Packard had 'agreed' with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal."

The District Court denied Packard's motion for a directed verdict at the close of Webster's evidence by a ruling at R. 466. It denied a similar motion at the close of all evidence by a ruling at R. 837. It submitted the case to the jury under the charge which appears at R. 936-949. The jury returned a verdict of $190,000 for Webster which the Court trebled and to which it added an attorney's fee. On October 25, 1955 the District Court denied Packard's motions for judgment n.o.v. and for new trial, R. 136-148. Packard appealed and Webster cross-appealed as to attorney's fees. A divided Court of Appeals, Bazelon J., dissenting, on April 18, 1957 reversed the trial court judgment and dismissed Webster's cross-appeal as moot (App. A, *infra*, p. 23). A timely motion for rehearing *in banc* was denied by a divided court on May 16, 1957 (App. C, *infra*, p. 31).

The majority below held that it was error to submit the case to the jury, and that Packard was entitled to judgment as a matter of law. The majority construed this Court's decision in *U.S. v. du Pont & Co.*, 351 U.S. 377, (the *Cellophane* case) as requiring a holding *as a matter of law* that Packard automobiles are "reasonably interchangeable by consumers" with other makes of automobiles; and that therefore it was error to permit the jury to decide whether, as Webster's evidence showed, there was a "Packard market" in Baltimore in which competition between Packard dealers was beneficial to the public, or whether, as Packard contended, the only market of interest to the public there was the market for all makes of cars.

On the premise that under the *Cellophane* case there is always, as a matter of law, effective competition between different makes of cars in the "relevant market", the majority below concluded that there can be no unreasonable restrait of commerce, nor an unlawful conspiracy to monopolize, by the establishment in any way or for any reason or motive whatever of an exclusive dealership in any one make—in this case Packards. In such circumstances, the Court declared, exclusive dealerships are "*per se* lawful", even when their establishment requires the destruction of the businesses of two competing dealers and the elimination of the benefit to the public from their competition for Packard business.

In his dissent Judge Bazelon expressed his belief that the District Judge's instructions were correct and that the evidence supported the jury finding thereunder of an unreasonable restraint of trade in violation of section 1 of the Sherman Act. He concluded that it was therefore unnecessary to consider whether under the Sec. 2 count Webster had made out a case from which the jury could have found that Packard had conspired with Zell to enable him to monopolize the Baltimore Packard market.

He also concluded that the jury was warranted in finding that Webster's elimination resulted "not from a unilateral decision by Packard in selecting its customers" [nor from a decision to establish an exclusive dealership in order to improve the manufacturer's competitive position vis-a-vis other manufacturers], "but rather from an agreement between Packard and Zell which amounted to a combination or conspiracy to get rid of Webster." The purpose of the Sherman Act, he said "is to protect the individual businessman as well as to assure to the consumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another." The fact that the agreement was vertical rather than horizontal did not, he said, call for a different conclusion.

REASONS FOR GRANTING THE WRIT

1. The court below has distorted this Court's decision in the *Cellophane* case into a holding *as a matter of law* that there can be no "Packard" market in automobiles, i.e. that the "relevant market" under *Cellophane* is the market for all makes of automobiles. This is contrary to the holding in *Cellophane* that the "relevant market" is always a matter of fact. The jury held on all the evidence and under proper instructions that there was, *in fact*, a "Packard market," which was unreasonably restrained by Packard to the damage of the public. Either the decision below means that *as a matter of law* there is no violation of law herein or the court invades the province of the jury in violation of the 7th Amendment.

2. Likewise the court below in effect held that a vertical conspiracy between an automobile manufacturer and a dealer was non-actionable. This is contrary to this Court's decision in *U.S. v. du Pont & Co.*, 25 L. Wk. 4343 (the *du Pont-General Motors* case) rendered June 3, last.

that a vertical conspiracy may be actionable depending on the facts.

3. The decision below extends this Court's decision in the *Cellophane* case into the area of attempts and conspiracies. These were expressly excepted by the Court in the *Cellophane* decision. The absurd rule now operating in the District of Columbia is that no matter how hard the conspirators try to restrain or monopolize a *part* of interstate commerce (i.e. the Packard part), they do not violate the Sherman Act unless their efforts are directed at the whole (i.e. the market for *all* automobiles).

4. Contrary to numerous decisions of this Court and of Federal Courts of Appeal the court below has invented a rule of "*virtual per se legality*" as to exclusive territorial dealerships—without regard to how or why they are achieved or what harm they accomplish.

Misapplication of the Cellophane Case

All the opinions in the *Cellophane* case hold that "relevant market" is a question of fact, 351 U.S. 377 at 381, 387, 394-5, 404, 413, 415-424. The majority below, however, treat the matter as a question of law. This was because they misconstrued a statement in Mr. Justice Reed's opinion (p. 939) as to automobiles and soft drinks, as though it were this Court's judgment that there cannot be a section 2 violation with respect to any particular make of automobile.

In the present case, the jury on substantial evidence and under specific instructions found as a fact that competition between the Baltimore Packard dealers was more important to the public than the competition between Packards and other makes of cars. The pertinent portions of the judge's charge (R. 944-5) make this clear.[2]

---

[2] "Coming now to the third element, namely, that the alleged unlawful conspiracy or agreement adversely affected

The majority below erroneously held that the *Cellophane* case invalidated as a matter of law the jury's decision that there was an attempt or conspiracy by Zell, aided and abetted by Packard, to monopolize. The majority said, "And there is no evidence of any attempt or conspiracy to create a monopoly, *since there is no evidence of any attempt to get control of the relevant market,*" i.e., the market for all makes of cars. (Emphasis supplied.) Coming after the majority's erroneous ruling that the *Cellophane* case requires it to hold as a matter of law that there was "reasonable interchangeability" between Packards and other automobiles, this statement amounts to a holding that where a manufacturer cannot be convicted under section 2 of a one-concern monopoly of a particular commodity because it is in competition with

---

the interests of the public, the plaintiff offered evidence tending to show that the public interest is promoted by competition among dealers in the same make of cars, since by such competition a prospective customer may choose as between dealers in an effort to get the best possible terms on such matters as allowances for used cars, better service, and the like. The defendant on the other hand claims that the only real competition is as between different makes of cars, and not between dealers in the same make of car and that, therefore, elimination or restraint of competition between dealers in the same make of car does not affect competition, and does not constitute a restraint of trade. What the fact is is for you to determine, ladies and gentlemen of the jury."

The Trial Judge also charged the jury that Webster could not recover unless the jury found an "unlawful conspiracy or agreement (which) adversely affected the interests of the public." (R. 942-3).

In the *Cellophane* case, duPont expressly denied the existence of a cellophane market. Packard never denied the existence of a Baltimore Packard market, but merely denied that it had conspired with Zell to enable him to monopolize it (R. 16-17 and 43; see also R. 2 and 31; 6-7 and 36; 15 and 42-43; 21 and 46; 28-29 and 50-51). Having failed to persuade the jury that it did not conspire with Zell to enable him to monopolize the Baltimore Packard market, Packard then persuaded a divided Court of Appeals to stretch the relevant market concept of the *Cellophane* case and rule that as a matter of law there is no such market.

other commodities, it is impossible to establish his violation of section 2 through an *attempt* or *conspiracy* with a preferred dealer to eliminate the dealer's competitors so that he can monopolize the market for the commodity.

The present case does not involve a section 2 charge of one-company monopoly. As Judge Bazelon points out (App. A, *infra*, p. 23), Webster's case is so strong under section 1 that its section 2 case need never be reached. To the extent that Webster's case depends on section 2, it is on the basis of an unreasonable and illegal conspiracy to eliminate multiple competing Packard dealerships theretofore established by and wholly satisfactory to Packard and of great value to the public in order that Zell might monopolize the Baltimore Packard market.

The majority decision below improperly extends the *Cellophane* decision to conspiracies and attempts to monopolize. These areas were expressly excluded by this Court from its decision there. 351 U.S. 377, at 379 and 381.

The majority decision below in effect treats the *Cellophane* case as overruling a long line of this Court's earlier decisions affirming convictions for conspiracies or attempts to monopolize in cases involving only parts of a market or parts of interstate commerce.[3] That this Court had no such intention is clear from Mr. Justice Reed's citations in support of his statement at p. 395, that "illegal monopolies under section 2 may well exist over limited products in narrow fields where competition is eliminated;" and from his comments and citations at pp. 386-7 with respect to the "Rule of Reason" in antitrust law.

---

[3] *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208; *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173; *U.S.* v. *Griffith*, 334 U.S. 100. See also *International Salt Co.* v. *U.S.*, 332 U.S. 392, 396, where it is said to be "unreasonable *per se* to foreclose competitors from any substantial market."

In discussing various matters relating to the relevant market problem, Donald F. Turner, Professor of Antitrust Law, Harvard Law School, in an article appearing in the December 1956 *Harvard Law Review*, entitled "Antitrust Policy and the Cellophane Case," said (p. 305):

> "If defendants are attempting to drive someone out of the market by foul means rather than fair there is ample warrant for not resorting to any refined analysis as to whether the intent is to drive everyone out or whether, having taken over all of the production of a particular commodity, the defendants would still face effective competition from substitutes. Coercive conduct is analogous to price fixing, attempts at which are illegal . . . 'and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n 59 (1940).'"

He added (p. 307):

> "It is reasonable to disregard any refined concept of market in attempt and conspiracy cases because the conduct involved is so egregious that it may be appropriately condemned *per se*."

This reasoning is applicable to the instant case because Zell complained *only* of the competition of the other Packard dealers in metropolitan Baltimore (R. 440-2, 315-16). There is no evidence that he complained of or was in the least bit concerned about the competition of dealers handling other makes of cars. Since the conspirators themselves thus carefully staked out the area Zell was to monopolize—the metropolitan Baltimore Packard market—and since the jury, too, found this to be the relevant area, there was no call for the Court below to re-survey the market. The most it should have done was to determine whether there was credible evidence to support the jury's finding.

For an excellent discussion of the lack of cross-elasticity between the various makes of automobiles, see "The

Resurgence of the Exclusive Territorial Distributorship as an Antitrust Problem," 40 Minn. L. Rev. 853 (June 1956), citing with approval the District Court's handling of the instant case. Also approving the District Court decision in the present case: "Recent Developments; Anti-Trust—Exclusive Car Dealership—Elimination of Competitive Dealer," 2 Howard Law Journal 256 (June 1956).

Since the Court below considered all makes of automobiles to be in the "relevant market," it probably would have held that "championship fights" are only a part of the relevant boxing market, thus conflicting squarely with the recent decision in *U.S.* v. *International Boxing Club*, 150 F.Supp. 397, 419 (S.D.NY). In the same way the decision below conflicts with *Kansas City Star Co.* v. *U.S.*, 240 F. 2d 643 (C.A. 8).

The misinterpretation of the *Cellophane* decision, and its extension into areas excluded from that decision introduces dangerous and undesirable doctrines into an important area of antitrust law.

Exclusive Dealerships Are Not "Virtually Per Se Lawful"

The right of a manufacturer to select those with whom it will deal is an important right. In the past, when a controversy arose between a manufacturer, acting independently in its own interest, and one of its dealers, the courts usually found for the manufacturer, emphasizing the manufacturer's right to determine how it should market its product. Thus dealers have learned that they must conduct their business so as to please the manufacturer on whom their business lives depend.

Now, if the decision below stands, dealers also will have to conduct their businesses so as not to offend their fellow dealers—especially those who are larger. They are faced with the dilemma that they may be lawfully cancelled by the manufacturer if they are not vigorous

enough to satisfy him, but if they are that vigorous a large dealer may with impunity persuade the manufacturer to get rid of them.

The decision below is an open invitation, with a grant of complete antitrust immunity, to every large, high-overhead dealer selling a product which is in some competition with somewhat similar products, and who is tired of competing with smaller, lower-overhead and frequently more efficient dealers, to do as Zell did and force the manufacturer to boycott the competing dealers by threatening to quit if he refuses.

No court has ever before announced the doctrine that exclusive dealerships are "virtually *per se legal*."[4] This pronouncement conflicts with the following authorities dealing expressly with the tests which must be applied in determining whether an exclusive dealership is lawful or unlawful:

United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6)

United States v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y.), *aff'd in part*, 321 U.S. 707

Fargo Glass & Paint Co. v. *Globe American Corp.*, 201 F. 2d 534 (C.A. 7), *cert. denied*, 345 U.S. 942

Bascomb Launder Corp. v. *Telecoin Corp.*,[5] 204 F. 2d 331 (C.A. 2); *cert. denied*, 345 U.S. 994

---

[4] The idea apparently came from a speech by Professor Milton Handler, cited and quoted from with approval by the majority below (App. A, *infra*, p. 26):

> "When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case."

[5] In the *Bascomb Launder Corp.* case, Judge Rifkind's elaborate

All these decisions regard an exclusive dealership as neither *per se* lawful nor *per se* unlawful, and hold that its place within or without the Sherman Act depends on whether, on the facts of each case as measured by the Rule of Reason laid down in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, the restraint imposed is reasonable or unreasonable. Cf. *G & P Amusement Co. v. Regent Theatre Co.*, 107 F. Supp. 453, *aff'd per curiam*, 216 F. 2d 749 (C.A. 6). Certainly exclusive dealerships should not be held lawful when set up by collaboration to eliminate a preferred dealer's competitors. See pp. 27-9, 132-7 and 327-8 of the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).[6]

The trial court instructed the jury that the antitrust laws prohibit only such restraints of commerce as are unreasonable; that business concerns have a right to select their customers and to prefer one over another, provided this right is exercised without ulterior motives.[7]

---

exclusive dealership analysis in the *Bausch & Lomb* case was paraphrased as follows:

> If there is no monopoly, the restraint is not unreasonable if it is
>
> (a) ancillary to a reasonable main purpose, and
>
> (b) fairly protective of the exclusive dealer's interests but not so large as to interfere with the interests of the public.

[6] At p. 29: "In accord with this reasoning, the Committee concludes that where an exclusive dealership forms part of an attempt to monopolize prohibited by section 2, or the lesser degree of unreasonable restraint prohibited by section 1, it should be held a violation. On the other hand, where an exclusive dealership is merely an ancillary restraint, reasonably necessary to protect the parties' main lawful business purposes, such a dealership should be upheld where its effect is no unreasonably to foreclose competition from the dealer's market." At p. 137: "However this Committee subscribes to vigorous condemnation of concerted and conspiratorial refusals to deal." See also p. 327-8.

[7] Cf. *Allen Bradley Co. v. I.B.E.W. Local No. 3*, 325 U.S. 797, where a labor union was found guilty of violating sections 1 and 2 of the Sherman Act when it used its power to aid a businessman to accomplish ends prohibited by the Act.

free from compulsion and without agreements with others that tend to unreasonably restrain commerce, and that the jury was to decide whether there was such a prohibited agreement between Zell and Packard or whether Packard acted "in the exercise of permissible business judgment and discretion." (R. 940, 943, 944).* The majority below did not question the correctness of the instructions. It held that there was no case for the jury because under the *Cellophane* decision there was no conspiracy to eliminate competition between dealers in *all* makes of cars in Baltimore and hence it was immaterial that Zell asked for his monopoly and his competitors were destroyed.

It is clear that it would have been *unlawful per se* if the competing Baltimore Packard dealers had agreed horizontally among themselves to fix prices in order to enhance their profits through non-competitive dealings. Yet under the majority decision, accomplishment of exactly the same kind of monopolistic price-fixing powers is declared *lawful per se* because it was brought about through a plan suggested by a powerful dealer and acquiesced in and implemented by the manufacturer.

The invalidity of such a distinction between horizontal and vertical conspiracies was pointed out in Judge Bazelon's dissent (App. A, *infra*, p. 29):

> "The Supreme Court has held that, even apart from monopolistic effect, a *vertical* agreement which excludes a competitor of one of the parties from a

---

*As Judge Bazelon pointed out in his dissent (App. A, *infra*, p. 28), ". . . the jury could have found as it apparently did, . . . that it was an agreement which amounted to a combination or conspiracy to get rid of Webster." He then pointed out that even individually conceived refusals to deal may be an element in violation of Sec. 1, citing *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707; *F.T.C.* v. *Beech-Nut Co.*, 257 U.S. 441; the Report of the Attorney General's National Committee, p. 134; and cf. *Dr. Miles Medical Co.* v. *Parks*, 220 U.S. 373 (1911).

substantial market violates Sec. 1 of the Sherman Act. See *Standard Oil of Calif. v. United States*, 337 U.S. 293, 305 (1949), explaining *International Salt Co. v. United States*, 332 U.S. 392 (1947).[9]

Admittedly if the decision below stands that exclusive dealerships are *per se* lawful simply because they relate to articles which are in competition with other somewhat similar trade-marked articles, a very knotty and bothersome antitrust problem will have been greatly simplified. However, the risk involved in resorting to such a shortcut and thus avoiding the expense and difficulty of such lengthy and hotly-disputed jury trials as the present case is twofold: a body of important antitrust principles, carefully laid down by prior cases, one at a time, upon the Rule of Reason itself, will be toppled; and gross injustice will be worked as in the present case. In short, rules of *per se* legality or *per se* illegality simplify antitrust problems but risk undermining the Rule of Reason itself. Cf. *Board of Trade of Chicago v. U.S.*, 246 U.S. 231, 238.

The decision below squarely conflicts with a recent unanimous decision of the Tenth Circuit which cites with approval the District Court's decision in the present case *Paramount Film Distributing Corp. v. Village Theater, Inc.*, 228 F. 2d 721. In an opinion by Chief Judge Phillips that Court held that a jury question is presented under Sec. 1 in cases like the present even though the conspiracy be vertical rather than horizontal.[10]

---

[9] The restraints of competition which are outlawed by Sec. 2 of the Robinson-Patman Act are always the result of vertical agreements. See *Van Camp & Sons v. American Can Co.*, 278 U.S. 245; *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61; cf. *U.S. v. du Pont & Co.*, 25 L.Wk. 4343, decided June 3, 1957 (*General Motors* case).

[10] In discussing the alleged conspiracy to restrain unduly interstate commerce in the showing of first-run pictures in the Salt Lake City area, Chief Judge Phillips said (p. 726): "So, in the

Likewise the majority's conclusion that such exclusive dealerships are *per se* legal conflicts with the following cases:

Albert Pick-Barth Co. v. Mitchell Woodbury Corp.,[11] 57 F. 2d 96 (C.A. 1), *cert. denied*, 286 U.S. 552

William Goldman Theaters, Inc. v. Loew's, Inc.,[12] 150 F. 2d 738 (C.A. 3), *cert. denied*, 334 U.S. 811

Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F. 2d 484 (C.A. 1), *cert. denied*, 344 U.S. 817

American Federation of Tobacco Growers, Inc. v. Neal,[13] 183 F. 2d 869 (C.A. 4)

---

instant case, if Paramount Film entered into an agreement, express or implied, with United and Intermountain to favor Intermountain in the distribution of first-run pictures and to deny the Villa Theater the right to bid for first-run pictures and to show day and date pictures, for the purpose of suppressing the competition of the Villa Theater with Intermountain and to unreasonably restrain trade or commerce in first-run pictures in the Salt Lake City area, such agreement was unlawful and actionable."

[11] At p. 102 the court said: "If a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition such a conspiracy, we think it is a violation of Section 1 of the Sherman Act. . . ."

[12] At p. 742-3 the court said: "Defendants urge us to recognize the rule 'long recognized' of a trader 'free to exercise his own independent discretion as to the parties with whom he will deal.' That doctrine has deep roots in our past. But like all postulates it has its limitations. . . . Plaintiff, as the mere lessee of a theater, has no right to demand defendants' products. But, plaintiff does have the right to have its business protected if there is concert of action directed at plaintiff which results in its removal from competition."

[13] At p. 873 the Court said: "As to the contention that the restraint of trade here involved [defendants had refused to allot plaintiff Danville tobacco market selling time] was a reasonable one, it is a sufficient answer that the effect of the action was to exclude a competitor from a substantial market in interstate commerce; and it is well settled that such exclusion is unreasonable *per se*."

Conflicting in varying degrees with the majority below: *Montague & Co. v. Lowry*, 193 U.S. 38; *Fashion Originator's Guild v. F.T.C.*, 312 U.S. 457; *U.S. v. Columbia Steel Co.*, 334 U.S. 495; *Union Circulation Co. v. F.T.C.*, 241 F. 2d 652 (C.A. 2); *U.S. v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D.C. Minn.); *U.S. v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215, 245 (S.D.N.Y.); *U.S. v. Detroit Sheet Metal & Roofing Contractors Association*, 116 F. Supp. 81 (E.D. Mich.); *Caldwell-Clements, Inc. v. Cuban Publishing Corp.*, 130 F. Supp. 362 (S.D.N.Y.); *Parmelee Transportation Co. v. Keeshin*, 144 F. Supp. 480, 485 (D.C. Ill.); *U.S. v. New Orleans Insurance Exchange*, 148 F. Supp. 915, 920 (D.C. La.). In particular note the serious conflict between the majority below and the courts of the State of New York: *Alexander's Department Stores v. Ohrbach's, Inc.*, 40 N.Y.S. 2d 631, *rev.* 42 N.Y.S. 2d 703.

Although others have done so, Webster does not contend that an automobile manufacturer, *acting independently and free from compulsion*, must sell to all who are able and willing to meet the terms of sale.[14] Nor does Webster contend that an automobile manufacturer, acting independently and free from compulsion, cannot give one dealer territorial security from the competition of others selling the same car,—although the Department of Justice and the Federal Trade Commission seem to take this position.[15] Webster does not contend that an automobile

---

[14] Senate Doc. 32, 85th Cong., 1st Sess., "The Right To Buy And Its Denial To Small Business," March 1957.

[15] H.R. 6544, 84th Cong., 2d Sess, provided that it would not be a violation of the Sherman Act for an automobile manufacturer to insert in his contracts with dealers whose franchises are limited to particular areas a requirement that, if they sold to a person living in the area of another dealer, they pay a stated amount to the other dealer. The Department of Justice, F.T.C. & Bureau of the Budget opposed the bill on the ground that the strict division of territory which would be implicit in such contracts is contrary to the broad competitive objectives of the Sherman Act. Hearings before the House Committee on Interstate and Foreign Commerce, July 6, 1955, pp. 8-9.

manufacturer is liable to a dealer for damages caused by the manufacturer's coercing or intimidating the dealer in bad faith. Congress, in passing Public Law 1026, 84th Cong., 2d Sess. (Aug. 8, 1956), has recently tried to outlaw such practice.[16]

The only limit which Webster urges upon an automobile manufacturer's right to refuse to deal is this: If the manufacturer has been selling to numerous competing dealers in a metropolitan area where there is plenty of business and all of the dealers are profiting, and if the manufacturer is pleased with all of the dealers and has

---

[16] This statute, though untested, seems to make automobile manufacturers liable to their dealers for the damages caused the dealers by the manufacturers' coercion and intimidation. Doubts as to the statute's wisdom have been expressed. See "Manufacturer-Dealer Legislation," 57 Col. L. Rev. 219-238 (Feb. 1957). Questions as to its enforceability have been raised. See "Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry," 70 Harvard L. Rev. 1239-1257 (May 1957). Actually the statute deals only with a very narrow segment of automobile manufacturer/dealer problems since its attempts to cover only those unsubtle and crude acts of coercion and intimidation.

One thing is certain about this new law: it will not protect a dealer in Webster's position who is neither "coerced" or "intimidated" but instead is struck down silently—without threat, complaint or warning of any kind—because of a larger dealer's threat to quit unless given monopoly power over the product.

Before passing this statute, Congress was told by the Department of Justice of Webster's District Court recovery. In commenting on certain amendments which he suggested be made (and which were made) to the bill under consideration, the Department of Justice witness said:

> "So amended the bill would supplement existing antitrust remedies a dealer may have against a manufacturer who conspires with another dealer to drive him out of business. And I refer to the *Webster Motor* case. That is the case where a dealer collected $190,000 trebled or almost $600,000 from a manufacturer who conspired with another dealer in the area to eliminate him. So antitrust at present may provide some remedy." (Hearings before the House Committee on the Judiciary, 84th Cong., 2d Sess., on H. R. 11360 and S. 3879; July 2, 3, 9 and 10, 1956; at p. 265.)

never thought of stopping its sales to any, it violates the Sherman Act if it yields to the threat of one dealer to quit unless it stops selling to the others in order to enable the preferred dealer to monopolize the market in the manufacturer's product.

Many important American manufacturers (e.g., RCA, John Deere, ESSO, General Electric, Chevrolet, Goodyear, etc.) market their products through competing independent dealers having large capital investments.[17] To uphold the decision below will do great injury to efforts to enforce the antitrust laws, and will open the doors to all sorts of undesirable practices by large dealers who, as in the present case, use their power to force destruction of competing dealers for selfish reasons and to the injury of the public.

The Schwing Case Is Not In Point

The majority opinion below places great reliance on *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F.Supp. 899 (D.C. Md), *aff'd per curiam*,, 239 F. 2d 176 (C.A. 4). Along with Judge Bazelon we believe that *Schwing* was wrongly decided[18] but whether it was or not is not con-

---

[17] The average capital investment of the forty thousand new car dealers in this country is $118,000. See H. Rept. 2850, 84th Cong., 2d Sess., on S. 3879, July 20, 1956.

[18] The Maryland District Court held controlling Judge Chestnut's decision in *Arthur* v. *Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D.C.Md.). There Arthur, a Baltimore wholesale food broker, sued for treble damages allegedly caused by Kraft's refusal to continue to sell to him. Arthur alleged *only* that Kraft conspired with its officers to force him out of business if he refused to buy out another distributor (Carpel) for $10,000 or to sell his own Kraft business to Carpel for $15,000. Unlike the basic purpose of the Packard-Zell conspiracy, i.e., to prevent the other Baltimore Packard dealers from competing with Zell, the Court said (p. 828):

> "There is nothing in the alleged facts to show that the motive of the defendant was to restrain trade or lessen competition and certainly nothing to show that the alleged unreasonable demand on the plaintiff could possibly have the

trolling here." There the Maryland District Court recognized that that case differed from *Webster* in certain critical respects by saying of the instant case at p. 905-6: "Packard gave Zell an exclusive contract in the Baltimore area and eliminated all rival dealers". In *Schwing*, in addition to Bankert (Zell's counterpart), there were two other Hudson dealers left in the Baltimore area after Schwing was eliminated The Maryland District Court said (p. 904):

> "It is not alleged that the public could not have bought as many Hudson automobiles as it wishes, either from Bankert *or from the two other Hudson dealers in the Baltimore metropolitan area* . . . or even that it was unable to buy *at competitive prices* all of the *Hudson* automobiles that it wishes to buy." (emphasis supplied)

Schwing does not involve the establishment of an exclusive territorial dealership and therefore does not justify the reliance placed upon it by the majority below. In affirming *Schwing per curiam* the U. S. Court of Appeals for the Fourth Circuit placed great emphasis on the fact that the conspiracy alleged was vertical not horizontal and hence immunized. In view of the decision of this Court in *U.S.* v. *du Pont & Co.*, 25 L. Wk. 4343, June 3, 1957, it is clear this reasoning is invalid. None of the

---

effect of lessening competition, or of raising prices or even maintaining prices . . . For all that the declaration alleges the discontinuance by the defendant of sales to plaintiff may have been accompanied by the appointment of one or more distributors; and the public's opportunity to buy the defendant's product may have been increased rather than lessened."

In contrast to the fact that Zell, not Packard, conceived the scheme here, there Carpel was an innocent bystander (pp. 829-30): ". . . rather a passive object of the conspiracy than an actor therein. Certainly it is not alleged that he did anything in furtherance of a conspiracy."

other cases relied on by Packard supported the doctrine that exclusive dealerships are "virtually *per se* legal".[19]

Contrary to the impression given by the majority opinion below that in most large metropolitan areas in 1952 there was only *one* Packard dealer (see App. A, *infra*, p. 26), the fact is that during that year there were an average of *twelve* competing Packard dealers in each of the ten most populous cities. See App. E, *infra*, p. 38. Webster called this error to the attention of the Court below (Petition for Rehearing *in banc*, p. —).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the present petition for certiorari be granted.

WILLIAM J. HUGHES, JR.
Bowen Building
Washington, D. C.

DONALD D. WEBSTER
3502 Turner Lane
Chevy Chase, Md.
Attorneys for Petitioner

---

[19] Of the following cases relied on by Packard, the Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 136, ftn. 28, states that they constitute examples of "buyers cut-off from supplies *for failure to adhere to the seller's distribution policy. . .*" (emphasis supplied), which is in no way involved in the instant case: *Brosious* v. *Pepsi-Cola Co.*, 59 F. Supp. 429, (M.D.Pa.), *aff'd on other grounds*, 155 F.2d 99 (C.A. 3); *Feddersen Motors, Inc.* v. *Ward*, 180 F.2d 519 (C.A. 10); *Hudson Sales Corp.* v. *Mark Waldrip*, 211 F.2d 268, 273 (C.A. 5), *cert. denied*, 348 U.S. 821; *Riedly* v. *Hudson Motor Car Co.*, 82 F.Supp. 8 (W.D.Ky.); *Dublin Distributors, Inc.* v. *Edward & John Burke, Ltd.*, 109 F.Supp. 125 (S.D.N.Y.).

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13152

PACKARD MOTOR CAR COMPANY, *et al.*, APPELLANTS

v.

THE WEBSTER MOTOR CAR COMPANY, APPELLEE

No. 13153

THE WEBSTER MOTOR CAR COMPANY, APPELLANT

v.

PACKARD MOTOR CAR COMPANY, *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

---

Decided April 18, 1957

Mr. Harold L. Smith, with whom *Messrs. Robert W. Barker, Louis M. Denit, Jerome G. Shapiro* and *Richard P. McGrath* were on the brief, for appellants in No. 13152 and appellees in No. 13153.

Messrs. William J. Hughes, Jr., and *Donald D. Webster*, with whom *Mr. William E. Leahy* was on the briefs, for appellee in No. 13152 and appellant in No. 13153.

Before EDGERTON, *Chief Judge*, and PRETTYMAN and BAZELON, *Circuit Judges*.

EDGERTON, *Chief Judge*: Packard Motor Car Company and two of its officers appeal from a judgment for $570,000 in favor of Webster Motor Car Company, a former Packard dealer in Baltimore, for alleged violation of the Sherman Antitrust Act. 15 U.S.C. §§ 1, 2, 15. The essential facts are not disputed.

There were formerly four dealers in Packard cars in Baltimore. In 1953 there were three, of which Webster was one. The usual dealer contract in the automobile business, and the contract between Packard and Webster, were for one year, with no option of extension. It was the custom in the business to extend contracts, from year to year, "barring some reason for cancellation." Webster and Packard had extended their contracts from year to year a considerable number of times.

In 1953 Zell Motor Car Company, the largest of the three Baltimore dealers in Packard cars, told Packard that Zell was losing money and would quit unless Packard gave it an exclusive contract. Packard told Zell it would do so, and told Webster and the other Baltimore dealer that their contracts would not be renewed. After Webster protested and threatened suit, Packard offered Webster the usual one-year renewal but refused to promise more. Packard told Zell, in effect, that this would be Webster's last renewal. Webster declined Packard's offer, quit the business, and brought this suit.

The District Court submitted to the jury the question whether there was an unreasonable restraint of trade, and also whether there was an agreement or attempt to monopolize. The jury found for the plaintiff and awarded $190,000 damages, which the court trebled in accordance with the statute. Motions for judgment notwithstanding the verdict, and for a new trial, were denied. The court held that the jury had "a right to reach the conclusion that an agreement on the part of the manufacturer with

one of its own dealers to terminate the franchise of all competitors and to grant to him a monopoly within a certain area, is an agreement in unreasonable restraint of trade, or an agreement to monopolize." *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F. Supp. 4, 9.

We think the defendants were entitled to judgment. We agree substantially with *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.Md. 1956), *aff'd*, 239 F. 2d 176 (C.A. 4, 1956).

1. There was no monopoly, or attempt or conspiracy to monopolize, within the meaning of the Sherman Act. The cellophane case, which had not been decided when the present case was tried, makes this clear. The Supreme Court there said: "this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product." And the Court held that "In considering what is the relevant market for determining the control of price and competition . . . commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." The Court accordingly held that, although du Pont produced about 75% of the cellophane sold in this country, there was no monopoly, because "the relevant market" was flexible packaging materials, including such things as glassine, waxed paper, and foil, as well as cellophane, and cellophane accounted for only 17.9% of this market. *United States* v. *du Pont & Co.*, 351 U.S. 377, 393, 395, 399-400. Since there are other cars "reasonably interchangeable by consumers for the same purposes" as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly. And there is no evidence of any attempt or conspiracy to create a monopoly, since there is no evidence of any attempt to get control of the relevant market.

2. There was no contract or conspiracy in restraint of trade within the meaning of the Sherman Act. As the court informed the jury, it has long been clear that only unreasonable restraints of trade are unlawful. *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1. When an exclusive dealership "is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality" until the District Court decided the present case.[1] Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, some of which were nearly as large as Baltimore, and such a ratio was typical in the automobile industry. The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement. The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it.[2]

The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advan-

---

[1] Handler, "Annual Antitrust Review", 11 *Record of the Ass'n of the Bar of the City of New York* 367, 370 (1956). *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534 (C.A. 7), *cert. denied*, 345 U.S. 942 (1953); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (C.A. 2), *cert. denied*, 345 U.S. 994 (1953); *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398-399 (S.D.N.Y.), *aff'd* by an equally divided court, 321 U.S. 707, 719 (1944). *Cf. Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565; *G. & P. Amusement Co.* v. *Regent Theater Co.*, 107 F. Supp. 453, *aff'd*, 216 F. 2d 749 (C.A. 6); *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (C.A. 2); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (C.A. 5); *Hexren Candy Co.* v. *The Curtiss Candy Co., et al*, CCH Trade Reg. Rep. ¶ 68,652 (N.D. Ga. March 8, 1957).

[2] Handler, *supra* note 2, at p. 372.

tageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.

3. Though Packard had formerly expressed an intention not to renew its contract with Webster, Packard offered and Webster refused the usual renewal. That Packard had agreed with Zell not to renew Webster's contract again when the proferred renewal expired is immaterial, not only because the agreement was legal, but also because it inflicted no damage.

The judgment in favor of Webster is reversed. Webster's cross-appeal concerning the amount of Webster's attorneys' fee is dismissed as moot.

No. 13152 *reversed;*
No. 13153 *dismissed.*

BAZELON, *Circuit Judge*, dissenting: Webster and Zell were competing Packard automobile dealers in Baltimore. In 1952 Packard served notice of termination of Webster's dealership, but then, after Webster's protest, offered to renew the dealership for only one year without further renewal.

I think the court properly instructed the jury upon the law applicable to conspiracies or combinations in restraint of trade in violation of § 1 of the Sherman Act and that the evidence supports the jury's finding in respect thereto. It is therefore unnecessary to decide whether the determination blow of a conspiracy to monopolize in violation of § 2 may also be sustained.

There was evidence that Zell had asked Packard to eliminate Webster as a competing Packard dealer; that Packard had never before considered that one dealer could be adequate representation in Baltimore; that

Packard had found Webster to be a satisfactory dealer with a good organization; that there was an "understanding" between Zell and Packard, and that Packard had "agreed" with Zell that Webster's franchise be ended; and that, when Webster balked at his demise and threatened to bring an action for damages, Packard had offered Webster a renewal of its franchise in the usual form for one year, which Packard had agreed with Zell would be a final renewal. As a Packard memorandum put it: "This . . . was reviewed in detail and agreed to by Mr. Zell."

From this evidence the jury could have found—as it apparently did—that Webster's elimination as a dealer resulted not from a unilateral decision by Packard in selecting its customers, but rather from an agreement between Packard and Zell to eliminate Zell's competitor and make Zell the sole distributor of Packard cars in Baltimore; in simple terms, that it was an agreement which amounted to a combination or conspiracy to get rid of Webster.[1]

The "common right" of an individual to engage in a lawful calling was protected against restraints at common law,[2] is encompassed within the protection of the Fourteenth Amendment[3] and forms the very basis of the Sherman Act.[4] The purpose of the Act is to protect the individual business man as well as to assure to the con-

---

[1] We are not called upon to decide whether § 1 of the Sherman Act applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's competitive position vis-a-vis more powerful manufacturers. Cf. *Schwing Motor Co.* v. *Hudson Sales Co.*, 138 F.Supp. 899, 906 (D.Md. 1956), *affirmed*, —— F.2d —— (4th Cir. 1956). That is not this case.

[2] *Darcy* v. *Allen*, 11 Coke 84b, 77 ENG.REP. 1260 (1576).

[3] *Butcher's Union* v. *Crescent City Co.*, 111 U.S. 746 (1884), concurring opinions of Mr. Justice Field and Mr. Justice Bradley

[4] *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497-98 (1940).

sumer the benefits flowing from free competition. Applied to a dealership situation, the Act does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another.[5]

Schwing Motor Co. v. *Hudson Sales Co.*, 138 F. Supp. 899 (D.Md. 1956), *affirmed*, —— F.2d —— (4th Cir. 1956), disagrees with the decision here under review. The latter case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. *Schwing* would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the commodity." 138 F.Supp. at 906. In this I think *Schwing* is wrong. The Supreme Court has held that, even apart from monopolistic effect, a *vertical* agreement which excludes a competitor of one of the parties from a substantial market violates § 1 of the Sherman Act.[6]

To avoid the application of the Sherman Act Packard contends that, because Webster rejected the proffered one-year renewal, the jury could not find that Packard refused to deal with Webster. But this contention is not persuasive. The record contains ample evidence from which the jury could have found that the renewal offer was not made in good faith, was prompted by Webster's threat to sue, and resulted from an agreement between Packard and Zell that it would be the last renewal.

---

[5] Even individually conceived refusals to deal may be an element in a violation of § 1 of the Sherman Act. *United States* v. *Bausch & Lomb*, 321 U.S. 707, 723 (1944); *Federal Trade Comm'n* v. *Beech-Nut Co.*, 257 U.S. 441 (1922); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955), at 134; cf. *Dr. Miles Medical Co.* v. *Parks*, 220 U.S. 373 (1911).

[6] See *Standard Oil of Calif.* v. *United States*, 337 U.S. 293, 305 (1949), explaining *International Salt Co.* v. *United States*, 332 U.S. 392 (1947).

APPENDIX B

Judgment of the Court of Appeals

Filed Apr 18 1957 Joseph W. Stewart, Clerk

* * * *

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in case No. 13,152, be, and it is hereby, reversed, and that this case be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is FURTHER ORDERED by the Court that the cross-appeal from the order of the said District Court allowing attorney's fees to plaintiff in case No. 13,153 be, and it is hereby, dismissed as moot.

It is further ORDERED by the Court that defendants (Packard Motor Car Company, et al.) recover from plaintiff (Webster Motor Car Company) their costs on these appeals and have execution therefor.

Dated: April 18, 1957.

Per Chief Judge Edgerton.

Separate dissenting opinion by Circuit Judge Bazelon.

APPENDIX C

Order Denying Petition For Rehearing *In Banc*

Filed May 16 1957 Joseph W. Stewart, Clerk

No. 13,152

• • • • • •

ORDER

Upon consideration of appellee's petition for a rehearing in banc, and of appellants' answer thereto, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: May 16 1957

Circuit Judge Danaher would grant the petition for rehearing in banc. Circuit Judges Washington and Burger did not participate in the foregoing order.

Filed May 16 1957 Joseph W. Stewart, Clerk

No. 13,153

• • • • • •

ORDER

Upon consideration of appellant's petition for a rehearing in banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby denied.

Per Curiam.

Dated: May 16 1957

Circuit Judge Danaher would grant the petition for rehearing in banc. Circuit Judges Washington and Burger did not participate in the foregoing order.

APPENDIX D

Statutes Involved

* * * *

As both Sections 1 and 2 of the Sherman Act are involved set out below are the relevant parts of these Sections as well as Section 4 of the Clayton Act. These are Sections 1, 2 and 15 respectively of 15 U.S.C.

Sec. 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *"

Sec. 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person of persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations shall be deemed guilty of a misdemeanor * * *"

Sec. 15. "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

* * * *

APPENDIX E

Supplementary Statement of Facts

The evidence warranted the jury in finding the following facts:

A. Prior to World War II, Packard cars were marketed in the Baltimore area through Zell as sole distributor (R. 38, 429-430). He appointed sub-dealers. Webster was one from 1937 to 1942 (R. 165-6). Because of Zell's power to cancel the sub-dealerships at will, he controlled their operations. They had to obtain cars and parts from Zell at his prices, to limit trade-in allowances to amounts approved by him and could not sell to persons whom he wanted for himself. They could not charge less than Zell for service, nor advertise without his approval (R. 1033-4, 1033-7 at 1035, 616-18; also R. 165-7, 173-4). The Zell organization had not changed materially between 1938 and 1952, and Packard knew this (R. 190).

B. Immediately after the war, Packard terminated Zell's distributorship and franchised multiple competing dealers in Baltimore. The dealers bought cars and parts directly from Packard at uniform prices, and competed freely with one another as to sale prices, trade-in allowances and cost of service (R. 165-7). Zell, Webster and two other dealers held such direct franchises in 1951 (R. 42-3, 45, 62, 76).

C. The new system was of great value to the Baltimore public as compared with the earlier arrangement under which prices of everything connected with Packard cars and service were fixed by Zell (R. 42-4, 171-3, 228-9, 329, 350-1, 440-1, 459-61, 519-20, 523-5, 527, 624, 1026-9, 1055).

D. In late 1951, Zell persuaded Packard to reduce the number of dealers from four to three by asserting that the competition of other Packard dealers was causing him

to operate "in the red", and that he was unwilling to continue in such a situation (R. 994, 1081-4, 993. Also R. 54, 64). On January 29, 1952, Zell renewed this assertion and threatened to give up his franchise unless Packard eliminated Webster and the other competing dealer DeBaugh [R. 996, 255-61, 315-16. See Int. 27(a) and (c), R. 54, 64-5].

E. Zell's statement that he was losing money was not true. His operations were profitable; but in the closing months of each year a book loss was produced by large increases in the already ample salaries of Zell's officers and owners, doubtless for tax purposes. If Zell's total salaries, commissions and wages had borne the same percentage relationship to Zell's total sales in 1949, 1950 and 1951 as Webster's bore to its total sales during the same period, Zell would have made a corporate net profit of $30,881.55 in 1949; $16,452.44 in 1950 and $18,390.52 in 1951. Packard knew all this from the monthly operating reports required of all dealers.[1] It repeatedly recom-

[1] Zell's monthly financial statements to Packard, 1949-53, are in evidence as defendant's Exs. (D) 68-72, but were not printed in the Joint Appendix. The originals have been transmitted to this Court. D. 68 shows that through November 25, 1949, Zell had a net profit of $4,528.32; but that in December, Mr. Zell increased his own monthly salary from $1,250 to $7,500 and that of the officers from $3,255.83 to $7,033.37. These increases, totaling over $9,000, and other extravagances, enabled Zell to show a corporate loss of $15,366.80 for 1949 (see Zell's financial statement for February 1949 and Packard's comments thereon, and the changes Zell made in its March 1949 statement to understand better that Mr. Zell's salary was reflected under "Salaries— Officers or Owners," while those of the other Zell officers appeared under "Salaries—Other Supervision").

Similar salary binges distributed Zell's profits in 1950 and 1951 (D. 69, 70). This is made plain by D. 69, Zell's financial reports for 1950 which shows that as of October 25, 1950, Zell had a corporate net *profit* year-to-date of $257.94. However, within 30 days Zell was able to report a corporate net *loss* year-to-date of $18,708.67. Mr. Zell merely paid himself a monthly salary of $13,550 for November and boosted his other officers' salaries from

mended and Zell ignored changes in operating and control techniques which Packard said would have increased Zell's profits from forty to sixty thousand dollars a year (see Defendant's Ex. 68, Dealer Financial Statement Analysis for January 1949; then R. 1058).

F. On February 11, 1952, Packard secretly agreed to do as Zell requested by refusing to renew Webster's and DeBaugh's franchises when they expired on March 31, 1952 (R. 264, 997, 535-7, 560-1, 999-1000, 1003, 1009-10, 283-5). They were not renewed and they were told their termination was final (R. 42-3; Int. 39 and 43, R. 55 and 66; R. 189-192, 266, 278-9, 1004, 1045-6, 274, 1035). Packard gave them no reason for doing so.

G. All Packard dealer franchises (as is true of many makes of automobiles and other products) are written

---

$1,516.69 in October to $8,358.37 for November. Zell's year-end corporate net "loss" was reported as $20,583.45.

To compute the profit Zell would have made if its total salaries, commissions and wages had borne the same percentage relationship to its total sales as Webster's did to its total sales requires comparison of the yearly December financial statements of the two firms appearing in D. 64-71. D. 68 reveals that Zell's *total* sales (including new and used cars, service, parts and accessories) for 1949 were $1,450,652.80, while its *total* salaries, commissions and wages (made up of four different accounts "Salaries and Commissions", "Salaries—Officers or Owners", "Salaries—Other Supervision" and "Other Salaries, Commissions and Wages") were $165,201.88, or 11.4% of total sales. But D. 65 shows that in 1949, to make $685,358.49 worth of sales, Webster's salaries, commissions and wages totaled only $55,044.75, or 8.2%. If Zell's total salaries, commissions and wages in 1949 had been 8.2% of its total sales, they would have totaled only $118,953.53, or a saving to Zell of $46,248.35 for the year. Instead of a year-end loss of $15,366.80, Zell would have shown a corporate net profit of $30,881.55.

Similar comparisons of Zell's and Webster's December statements for 1950 (D. 69 and 64, respectively) and 1951 (D. 70 and 66, respectively) establish that Zell would have profited $16,452.44 in 1950 and $18,390.52 in 1951 if it had maintained the same ratio between salaries, commissions and wages and total sales as Webster's.

for one year periods expiring automatically each March 31st (Ans. pars. 48-9, R. 42-3). Packard customarily renewed them from year to year in the absence of grounds for cancellation for cause because of misconduct of the dealer (R. 311, 445-6, 456-8, 466).

H. Packard had no basis for cancelling Webster's or DeBaugh's franchises for cause [Int. 28(b), R. 54-5 and 65; R. 519]. They were both satisfactory and each was making money. Webster's gross business in 1951 was $641,769.41 (Defendant's Ex. 66, Webster's December 1951 statement). Packard had not contemplated their non-renewal nor abolition of a competing dealership system until Zell's demand (R. 265, 442, 434, 462).

I. There were special reasons for continuing Webster as a dealer. For many years he had sold more Packard cars than any other salesman in the world. When his showroom was destroyed by fire in 1949, and he hesitated to make the $100,000 investment necessary to replace it, Packard urged him to do so and assured him that his franchise would be continued for many years (R. 432-9, 456-8, 463-5, 184-5, 199, 208, 218-9, 912, 915).

J. There was no shortage of Packards (R. 444). Enough were available to enable each of the three dealers to make money. Almost undoubtedly new dealer capital would have been available if Zell had quit. The $1,350,000 of Packard business which went to Zell in 1953 (Int. 109, R. 61, 72-5) maintained four Washington, D. C. dealers still listed in Packard's ad in the Classified Telephone Directory of February 1956 (Covington, McNey, Central and O'Brien-Rohall).

K. Packard concealed from Webster its agreement with Zell (R. 279). It did not test the reality of Zell's threat to resign, nor try to persuade him to continue. The only thing it did was try to get DeBaugh and Webster, once their franchises with Packard were terminated, to stay

on again as Zell-controlled, non-competitive sub-dealers (R. 180, 182, 973, 1004-5, 1042, 998; 324-31, 333-7).

It did not seek a substitute to fill Zell's place if he carried out his threat. Nor did it inquire whether Webster could enlarge his operations to take up the slack which would be caused if Zell quit (R. 313-4, 591). Webster, on March 9, 1952, in pleading for franchise renewal, had offered to invest more capital (R. 973).

L. On Webster's objection to the unexplained non-renewal of his franchise, Zell and Packard secretly agreed to try to get Webster to agree to a new franchise limited to July 1 (R. 999; Int. 69, R. 58, 68; R. 1045-6, 274). On Webster's refusal and continuing objection to its cancellation (R. 1035, 189-92), Packard and Zell agreed that Packard should offer Webster a contract to run until March 31, 1953, subject, however, to a secret agreement between Packard and Zell that Webster's franchise would not be renewed thereafter (R. 292-3, 552, 1044, 286-9, 1003-5). Webster stated its willingness to accept the extension if Packard would state that it was offered in good faith rather than as a "postponement of a death sentence" (R. 977-9). Packard refused to give such assurances (R. 979, 976-7), ordered all programs for Webster "cancelled immediately" (R. 1152-5, 1030), and decreed that "The Zell Motor Car Company will now handle the Baltimore Metropolitan Area exclusively" (R. 1007-8, and 1005-6).

M. Therefore, by mid-1952, Baltimore, sixth among the ten most populous cities in the United States according to the 1950 Census, had only one Packard dealer: Zell.

In each of the other nine cities there were then an average of twelve competing Packard dealers.[2]

N. After becoming sole dealer, Zell advertised for salesmen "tired of multiple-dealer competition" (R. 1055). Purchasers of Packard cars in Baltimore, no longer having competing Packard dealers there so that they could check one dealer's prices against another's and get the benefits of multiple-dealer competition, were deceived by Zell into believing they were getting from him high trade-in allowances on their used cars, when in reality all he did was boost Packard's "suggested retail price" on the new car by the amount he increased the allowance on the used car (R. 1060-6 at 1062-3).

---

[2] The Circuit Court majority stated (App. A, *infra*, p. 26):

"Of Packard's 1600 dealers, 1100 were the only Packard dealers in their cities, *some of which were nearly as large as Baltimore*, and such a ratio was typical in the automobile industry." (Emphasis supplied.)

Diligent search has turned up no Record support for the emphasized portion of the asserted fact. See R. 474.

Going outside the Record to the Library of Congress, the following is a tabulation of "Authorized Packard Dealers" whose names are listed in the official Packard Motor Car Company ads in the yellow pages of the 1952 telephone directories of the ten most populous cities according to the 1950 Census:

1. New York (Queens, Bronx, Manhattan & Brooklyn)	19	6. Baltimore	4
2. Chicago	17	7. Cleveland	8
3. Philadelphia	12	8. St. Louis	2
4. Los Angeles	14	9. Washington, D. C.	9
5. Detroit	15	10. Boston	13

This was brought to the Circuit Court's attention by Webster's petition for Rehearing *in banc*.